U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

B7

[redacted]

File: WAC-97-207-50983 Office: California Service Center Date: NOV 27 2000

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, California Service Center. An appeal from the decision was summarily dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner on motion to reconsider. The motion to reconsider will be dismissed. The Service, however, will reopen the proceeding *sua sponte* and will examine the matter on its merits. The previous decision denying the petition will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5). The director determined that the petitioner had failed to establish that he had invested, or was in the process of investing, the required amount of capital for which he was personally at risk.

The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, on August 8, 1997. The petition was denied in a decision by the center director dated August 3, 1998. Counsel for the petitioner filed an appeal from the decision on September 8, 1998, stating that an appellate brief would be forthcoming on or before October 8, 1998. The Associate Commissioner for Examinations, by and through the Director, Administrative Appeals Office ("AAO"), summarily dismissed the appeal pursuant to 8 C.F.R. 103.3(a)(1)(v) on May 24, 1999, finding that the petitioner had failed to submit an appellate brief specifying an error of law or fact in the underlying decision.

On motion, counsel contends that a brief was timely submitted to the AAO by express mail. Counsel provided the sender's copy of an express mail receipt addressed to the AAO dated October 3, 1998. The document indicates that an item was mailed to the Service on the date indicated. It does not, however, establish that an appellate brief for the instant case was timely received by the AAO as claimed. Absent proof that a brief was timely received, the motion must be and hereby is dismissed. In its discretion, the Service will reopen the proceeding on its own motion and will reconsider the matter on its merits.

§ 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United

> States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner is a native and citizen of Japan. His current immigration status in the United States is unknown. The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition is based on an investment in an original business, Ueno Clinic, Inc. ("Ueno Clinic"), a Hawaii corporation. The record reflects that Ueno Clinic was established on May 11, 1995, in Honolulu, Hawaii. The stated purpose of Ueno Clinic is to serve as an urgent care medical facility with a special emphasis on serving Japanese speaking tourists in Hawaii as well as serving local residents who are employed in the tourist area of Waikiki beach where the facility is located in a hotel. The petitioner claimed on the petition form to have invested $1.2 million dollars into the new commercial enterprise as of the time of filing. The petitioner also stated that he is considering opening additional facilities in other tourist areas in the United States.

QUALIFYING CAPITAL INVESTMENT

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars....
>
> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.
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> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt,

obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Ueno Clinic, Inc. qualifies as a new commercial enterprise having been established after November 29, 1990. 8 C.F.R. 204.6(e). The

petitioner submitted documentation showing that he is the president and sole shareholder of the new commercial enterprise. To support his claim of having made the requisite capital contribution, the petitioner submitted documentation of periodic cash transfers to the new commercial enterprise, dating from June 1995 to October 1997, in varying amounts totaling $1,562,858. The petitioner submitted documentation of approximately fifty-two such deposits into the corporate account of [redacted]. All of the transfers were from [redacted] Ltd., Tokyo, Japan [redacted].

The burden is on the petitioner to establish that he has made a qualifying contribution of capital. The definition of *capital* at 8 C.F.R. 204.6(e) means cash or other assets owned by the alien entrepreneur. Any indebtedness secured by the assets of the new enterprise is precluded from qualifying. Id. Any indebtedness secured by assets owned by the entrepreneur are qualifying provided that he is personally and primarily liable. Id. The definition of *invest* at 8 C.F.R. 204.6(e) further precludes from qualifying any debt arrangement between the entrepreneur and the new enterprise. In Matter of Soffici, Int. Dec. 3359 (Assoc. Comm., Ex., June 30, 1998), it was held that a petitioner must present clear documentary evidence establishing that any funds invested were his own and were obtained through lawful means.

The petitioner claimed to be the principal shareholder of [redacted] Ltd. He stated that [redacted] was a business operating "several" medical clinics in Japan owned by himself and other family members. In the decision, the director found that there was no evidence establishing that the cash deposits from [redacted] were the petitioner's personal funds. The director noted that it is well established in immigration law that a corporation is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). The director therefore concluded that the petitioner had failed to establish that the cash transfers from [redacted] Co., Ltd. were the petitioner's personal funds for which he was "personally and primarily liable" and thereby failed to establish a qualifying contribution of capital.

On motion, counsel did not submit a copy of the appellate brief he claimed had been originally submitted to the AAO. In the statement submitted on motion, counsel argued, in pertinent part, that:

> Petitioner submits that the money sent from Japan to the commercial enterprise were actually funds personal to the petitioner. These funds were part of the petitioner's compensation and consulting fees payable to him as a director of Kokusai (International Development Co., Ltd).

* * *

> As such, these funds are funds for which the petitioner is personally, primarily and solely liable. As wire transferred cash, these funds are clearly capital which are at risk having already been spent by the enterprise.

Counsel supported his argument with a letter from International Development Co., Ltd., Tokyo, Japan dated September 7, 1998, signed by the petitioner, as chairman of that company, and another individual, as its president. It was stated in the letter that the money sent by International Development Co., Ltd. to Ueno Clinic was the petitioner's "personal money" taken from his "consulting fees and director's compensation." Counsel also submitted a letter dated September 21, 1998, from the petitioner's tax accountant in Japan stating that the funds were drawn on the account of [redacted] in order "to take advantage of better currency exchange rates." It was also stated that all future investments into the company will be drawn from the petitioner's personal accounts to demonstrate that the investments are from the petitioner's personal funds.

The petitioner submitted extensive documentation that funds were transferred to the new commercial enterprise and that funds have been used for construction, renovation, equipment and supplies of the new commercial enterprise. The question remaining is the source of the investment capital. The argument that the business-to-business international wire transfers of cash were actually the petitioner's compensation from the foreign corporation and thereby constituted an investment of his personal cash assets is not substantiated.

First, as noted by the director, a corporation is an entity distinct from its shareholders. To claim that the wire transfers from a corporate entity were actually the petitioner's compensation, in some form of "direct deposit" arrangement, is not persuasive. The Service has no means to evaluate the fifty-two wire transfer receipts other than at face value. The record shows that the funds deposited were from a foreign corporate account of [redacted] and were funds under the control of that entity. Merely declaring that funds were somehow the petitioner's personal assets does not satisfy the petitioner's burden of proof. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Based on the evidence of the wire transfer receipts, it can only be concluded that the capital invested into Ueno Clinic was that of the foreign business entity. The unsupported assertions of counsel to the contrary do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988); Matter of Laureano, 19 I&N Dec. 1 (BIA 1983); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

Second, the petitioner claimed to be the majority shareholder in a family-owned business enterprise in Japan, Kokusai Kaihatsu Co.,

Ltd. He may have wide discretion of action in that business and may view the assets of the corporation as his and his family's personal funds. Nevertheless, based on Matter of Tessel, et al, fund transfers from a business entity can only be considered to be the property of that entity and not of an individual.

Third, the petitioner failed to submit any documentation of the financial arrangement(s) underlying the wire transfers. 8 C.F.R. 204.6(j)(2)(iv) states that monies transferred to the new enterprise in exchange for shares of stock is evidence of a qualifying capital investment. In this case, the petitioner claimed sole ownership of Ueno Clinic's stock, but did not submit corroborating documentation such as the stock purchase agreement including any terms of indebtedness that may exist. The wire transfers from [redacted] could represent a subsidiary arrangement between the two companies. Similarly, the wire transfers could be based on any of a number of loan or debt arrangements between the two companies and/or the petitioner which may or may not be disqualifying. Therefore, the wire transfers are insufficient to establish that the funds transferred represented the petitioner's personal assets or were assets for which he was personally and primarily liable.

Fourth, the petitioner failed to establish the relationship between [redacted] and International Development Co., Ltd. The letter from International Development Co., Ltd. regarding wire transfers from [redacted] Co., Ltd. is meaningless absent documentation of the relationship between those two companies. The petitioner also failed to submit evidence of his claimed compensation arrangements from any foreign corporation or the nature of his purported receipt of "consulting fees" from a family-owned business in which he claims to be principal shareholder. In addition, the letter signed by the petitioner himself, on the letterhead of International Development Co., Ltd., to support his personal testimony in this proceeding is of little value. The mere submission of unsubstantiated personal testimony is considered self-serving and does not satisfy the evidentiary standard set forth in Matter of Treasure Craft of California. For these reasons, the letter from International Development Co., Ltd. is insufficient to support counsel's argument.

Fifth, the petitioner did not submit verifiable evidence showing the financial status of Ueno Clinic including its assets, liabilities, and shareholder equity. The petitioner submitted multi-year "projected" financial statements for Ueno Clinic, but did not submit any actual audited financial statements or balance sheets. The simple submission of bank wire transfers and stock certificates is not sufficient to establish that a qualifying investment of capital has been made by the petitioner.

Sixth, the petitioner must demonstrate that the requisite amount of capital is at risk. 8 C.F.R. 204.6(j)(2). While the petitioner submitted documentation that approximately $1.5 million was

transferred to the new commercial enterprise, there is no documentation that at least $1 million has been used to establish the business or that at least $1 million will be used as of the termination of the two-year conditional period. Therefore, regardless of the source of the capital transferred to the account of the new enterprise, the record does not establish that the requisite amount of capital is at risk in a profit-generating enterprise. Merely depositing funds in a corporate account is not sufficient to demonstrate that the capital is at risk. Matter of Ho, I.D. 3362 (Assoc. Comm., Ex., July 31, 1998).

Based on the evidence furnished, it cannot be concluded that the petitioner has overcome the grounds for denial of the petition. The petitioner failed to establish that he has invested at least $1,000,000 of personal assets into the new commercial enterprise.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise...This definition shall not include independent contractors.
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> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
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> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a

> temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

The petitioner's original business plan indicated that Ueno Clinic would employ ten full-time and eight part-time personnel. The petitioner submitted copies of fifteen 1996 W-2 forms for Ueno Clinic's employees. One of the W-2s was for a physician, John Magauran, in the amount of $45,832 tending to indicate full-time employment. The remaining fourteen W-2s were for amounts from $1,840 to $11,250 tending to indicate part-time employment. Part-time employees do not satisfy the statutory requirement for the creation of at least ten full-time permanent new jobs. The business has been in operation since 1995 and the petition was filed in 1997. There is no evidence in the record that Ueno Clinic has created at least ten new full-time jobs. The petitioner also failed to submit any documentation supporting the contention that the business would create at least ten full-time positions within the two-year conditional period as alleged in the business plan. The petitioner did not specifically address this issue in any written statement other than in the business plan. For this additional reason, the petition may not be approved.

In conclusion, the petitioner is ineligible for alien entrepreneur classification because he has failed to establish that he has invested at least $1 million into a new commercial enterprise, has failed to establish that the capital that was contributed to the enterprise was a qualifying investment of capital, and has failed to demonstrate the requisite employment creation.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.